

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI**

ERICA R. BARRETT, KATHLEEN D.)	
VINCENT, CONNIE ENDERLE,)	
EDWARD Q. INGERSON, II, PENNY M.)	
KENOYER and GILBERT J. ONTIVEROS,)	Case No. 6:22-cv-03111-JAM
individually and on behalf of all others)	
similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	
)	
O'REILLY AUTOMOTIVE, INC., THE)	
BOARD OF DIRECTORS OF O'REILLY)	
AUTOMOTIVE, INC., O'REILLY)	
AUTOMOTIVE 401(K) PLAN)	
INVESTMENT COMMITTEE and JOHN)	
DOES 1- 30.)	
)	
Defendants.)	

**PLAINTIFFS' MOTION FOR LEAVE TO FILE A NEW RELEVANT AUTHORITY IN
SUPPORT OF THEIR OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE
FIRST AMENDED CLASS ACTION COMPLAINT**

Plaintiffs, Erica R. Barrett, Kathleen D. Vincent, Connie Enderle, Edward Q. Ingerson, Penny M. Kenoyer and Gilbert J. Ontiveros, individually and on behalf of all others similarly situated (collectively, "Plaintiffs") by and through their attorneys, hereby respectfully request leave to file the attached new relevant authority in support of Plaintiffs' Suggestions in Support of their Opposition to Defendants' Motion to Dismiss the First Amended Class Action Complaint (ECF No. 33). In support of this Motion for Leave, Plaintiffs aver as follows:

1. On September 2, 2022, Defendants filed their motion to dismiss the First Amended Class Action Complaint and Suggestions in Support. *See* ECF Nos. 26 and 27. Plaintiffs filed their Suggestions in Opposition on September 23, 2022. *See* ECF No. 33. On October 7, 2022, Defendants filed their Reply Suggestions. *See* ECF No. 36.

2. Recently, a new relevant decision supporting Plaintiffs' submission of their Suggestions in Opposition was issued, upholding excessive recordkeeping claims similar to those alleged by Plaintiffs. Attached hereto as Exhibit 1 is a proposed notice attaching *In re Sutter Health ERISA Litigation*, No. 1:20-cv-01007-JLT (E.D. Cal. Feb. 9, 2023).

3. In *In re Sutter Health ERISA Litigation*, No. 1:20-cv-01007-JLT (E.D. Cal. Feb. 9, 2023), the court denied the defendants' motion to dismiss, holding, among other things, that allegations need not include the details of services obtained by Plaintiffs' comparators at the motion to dismiss stage because "It is sufficient at this stage that Plaintiffs allege specific facts supporting their claims that the Plan's fees and Total Plan Cost were excessive for its size. On these facts, the Court can draw a plausible inference that Defendants failed to act prudently when negotiating fees and costs for the Plan." *Id.* at 18:1-6 (citing *Johnson v. Fujitsu Tech. & Bus. Of Am., Inc.*, 250 F.Supp.3d 460, 467(N.D. Cal. 2017)).

4. Here, like the plaintiffs in *Sutter Health*, Plaintiffs have alleged claims that Defendants subjected Plan participants to excessive recordkeeping and administrative fees, failed to leverage the Plan's size to negotiate the recordkeeping fees, and failed to remain informed about overall trends in the marketplace with respect to the fees paid by comparably sized plans. Plaintiffs respectfully submit *Sutter Health* as persuasive authority regarding the analysis of what constitutes adequate recordkeeping allegations.

WHEREFORE, Plaintiffs respectfully request that the Court grant this request for leave to file the attached notice of supplemental authority in support of Plaintiffs' Suggestions in Support of their Opposition to Defendants' Motion to Dismiss the First Amended Class Action Complaint (ECF No. 33).

Dated: February 24, 2023

Respectfully submitted,

CAPOZZI ADLER, P.C.

/s/ Mark K. Gyandoh

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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all attorneys of record.

/s/Mark K. Gyandoh